OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

August 13, 2003

Ms. Margaret A. Roll
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Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2003-5664

Dear Ms. Roll:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 185064.

The Texas Department of Human Services (the "department") received a request for information related to three specified nursing facilities. You state that the department has released a portion of the requested information. However, you claim that some of the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, you acknowledge that the department has not sought an open records decision from this office within the ten business day time period pursuant to section 552.301 of the Government Code, and we note that you have not provided this office with the required documents within the fifteen business day time period as prescribed by section 552.301. *See* Gov't Code § 552.301. Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). You assert section 552.101 of the Government Code. Thus, we will address your argument accordingly.

Next, we note that the submitted documents consist of orders issued by the department. These decisions and the attachments incorporated therein are made public by statute and ordinarily must be released to the requestor. Gov't Code § 2001.004 (state agency shall make available for public inspection all final orders, decisions, and opinions); *see also* Gov't Code § 552.022(a)(12) ("final opinions, including concurring and dissenting opinions, and orders issued in the adjudication of cases" not excepted from public disclosure unless made confidential by law). Generally, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") preempts a contrary provision of state law. *See* 45 C.F.R. § 160.203. For purposes of HIPAA, "contrary" means the following:

> (1) A covered entity would find it impossible to comply with both the State and federal requirements; or
>
> (2) The provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of part C of title XI of the Act or section 264 of Pub. L. 104-191, as applicable.

45 C.F.R. § 160.202. In this case, it would be impossible for the department to comply with both section 2001.004 of the Government Code and HIPAA. Additionally, although there are exceptions to the general preemption rule, none of these exceptions are applicable in this instance. *See* 45 C.F.R. § 160.203. Therefore, we find that section 2001.004 is contrary to HIPAA, and HIPAA preempts section 2001.004.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You claim that HIPAA governs some of the submitted information. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164; *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. Pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

Section 160.103 defines a covered entity as a health plan, a health clearinghouse, or a healthcare provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter. 45 C.F.R. § 160.103. In this instance, the department explains that it is a health plan under HIPAA because as an administrator of part of the Medicaid program, the department is considered a health plan. Based on your representations, we conclude the department is a covered entity under HIPAA.

Under these standards, a covered entity may not use or disclose protected health information, except as provided by the Code of Federal Regulations, parts 160 and 164. 45 C.F.R. § 164.502(a). Section 160.103 of title 45 of the Code of Federal Regulations defines the following relevant terms as follows:

> Health information means any information, whether oral or recorded in any form or medium, that:
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> > (1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health clearinghouse; and
> >
> > (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.
>
> Individually identifiable health information is information that is a subset of health information, including demographic information collected from an individual, and:
>
> > (1). Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
> >
> > (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
> >
> > > (i) That identifies the individual; or
> > >
> > > (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.
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> Protected health information means individually identifiable health information:
>
> > (1) Except as provided in paragraph (2) of this definition, that is:
> >
> > > (i) Transmitted by electronic media;
> > >
> > > (ii) Maintained in electronic media;
> > >
> > > (iii) Transmitted or maintained in any other form or medium.

45 C.F.R. § 160.103. You contend the submitted information contains individually identifiable protected health information, which you have marked. Upon review of the marked and highlighted information, we agree that most of it is protected health information as contemplated by HIPAA. We have marked the information that is not protected health information under HIPAA. In regard to the protected health information, however, a covered entity may use protected health information to create information that is not individually identifiable health information, i.e., de-identified. 45 C.F.R. § 164.502(d)(1). The privacy standards that govern the uses and disclosures of protected health information do not apply to information de-identified in accordance with subsections 164.514(a) and (b) of the Code of Federal Regulations. 45 C.F.R. § 164.502(d)(2).

Under HIPAA, a covered entity may determine health information is not individually identifiable only under certain circumstances. One method requires a person with specialized knowledge of generally accepted statistical and scientific principles and methods for rendering information de-identifiable to apply and document such methods and principles to determine release of protected health information would result in a very small risk of individual identification. 45 C.F.R. § 164.514(b)(1). The other method requires the covered entity to meet the following two criteria: 1) remove specific identifiers, including but not limited to, names, dates directly related to an individual, telecommunication numbers, vehicle identifiers, and any unique identifying number, characteristic, or code and 2) the covered entity must not have actual knowledge that the information could be used alone or in combination with other information to identify an individual who is a subject of the information. *See* 45 C.F.R. § 164.514(b)(2)(i), (ii).

In regard to the first method of de-identification, you state that "no statistician, mathematician, or other similar professional has concluded that the risk is very small that the information, alone or in combination with other reasonably available information, could be used to identify an individual." Thus, de-identification under this method is not applicable in this instance.

Consistent with the second method of de-identification, we have marked for redaction the specific identifiers in the submitted protected health information. *See* 45 C.F.R. § 164.514(b)(2)(i)(A)-(R). In regard to the second method of de-identification, you explain that the "names of the facilities reveal the street address, city, and zip code of the individuals who reside in the facilities," and that de-identification would require the removal of this information. In this case, we disagree that de-identification under section 164.514(b)(2)(i) requires that facility names be removed from the submitted information. You also contend that de-identification "would be impossible in circumstances like this one where a requestor asks for reports regarding particular facilities." If the department has actual knowledge that the de-identified information, as we have marked it, could be used alone or in combination with other information to identify the subject of the health information, then the department must withhold the protected health information in its entirety under section 552.101 of the Government Code in conjunction with HIPAA. To the extent that the department has no actual knowledge that the de-identified information, as we have marked it, could be used alone or in combination with other information to identify the subject of the health

information, the department must withhold only the types of information that we have marked under section 552.101 of the Government Code in conjunction with HIPAA and release the remaining information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/lmt

Ref: ID# 185064

Enc: Submitted documents

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